No. 15-1500

IN THE

Supreme Court of the United States

BRIAN LEWIS, ET AL.,
Petitioners,

v.

WILLIAM CLARKE,
Respondent.

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF CONNECTICUT

BRIEF FOR *AMICI CURIAE* SEMINOLE TRIBE OF FLORIDA, ET AL.,* IN SUPPORT OF RESPONDENT

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December 21, 2016

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Prairie Band Potawatomi Nation

Kickapoo Traditional Tribe of Texas

Cheyenne and Arapaho Tribes

Absentee-Shawnee Tribe of Indians of Oklahoma

Lac du Flambeau Band of Lake Superior Chippewa

Pueblo of Pojoaque

Guidiville Rancheria of California

Wampanoag Tribe of Gay Head (Aquinnah)

Rincon Band of Luiseño Indians

Alabama-Coushatta Tribe of Texas

Spokane Tribe of the Spokane Reservation

Swinomish Indian Tribal Community

United South and Eastern Tribes, Inc.

California Nations Indian Gaming Association

Tribal Alliance of Sovereign Indian Nations

QUESTION PRESENTED

Whether the sovereign immunity of an Indian tribe bars individual-capacity damages actions against tribal employees for torts committed within the scope of their employment.

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INTEREST OF *AMICI CURIAE*[1]

The Seminole Tribe of Florida, Lytton Rancheria, Santa Ynez Band of Chumash Indians, Suquamish Tribe, Prairie Band Potawatomi Nation, Kickapoo Traditional Tribe of Texas, Cheyenne and Arapaho Tribes, Absentee-Shawnee Tribe of Indians of Oklahoma, Lac du Flambeau Band of Lake Superior Chippewa, Pueblo of Pojoaque, Guidiville Rancheria of California, Wampanoag Tribe of Gay Head (Aquinnah), Rincon Band of Luiseño Indians, Alabama-Coushatta Tribe of Texas, Spokane Tribe of the Spokane Reservation, and the Swinomish Indian Tribal Community are federally recognized Indian Tribes. *Amicus* United South and Eastern Tribes, Inc. (USET) is an intertribal organization comprised of 26 federally recognized Indian Tribes in the southern and eastern United States.[2] *Amicus* California Nations Indian Gaming

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[1] No counsel for any party authored this brief in whole or in part, and no person or entity other than *amici* and their counsel has made a monetary contribution intended to fund the preparation or submission of this brief. Pursuant to Rule 37.3, counsel of record for the Petitioners has consented to the filing of this brief, and written notification of that consent accompanies this filing. The Respondent has filed blanket consent for the filing of *amicus curiae* briefs in support of either or neither party.

[2] The USET member Tribal Nations are: Alabama-Coushatta Tribe of Texas; Aroostook Band of Micmacs; Catawba Indian Nation; Cayuga Nation; Chitimacha Tribe of Louisiana; Coushatta Tribe of Louisiana; Eastern Band of Cherokee Indians; Houlton Band of Maliseet Indians; Jena Band of Choctaw Indians; Mashantucket Pequot Tribal Nation; Mashpee Wampanoag Tribe; Miccosukee Tribe of Indians of Florida; Mississippi Band of Choctaw Indians; The Mohegan Tribe; Narragansett Indian Tribe; Oneida Indian Nation; Passamaquoddy Tribe - Pleasant Point; Passamaquoddy Tribe - Indian Township; Penobscot Indian Nation; Poarch Band of Creek Indians; Seminole Tribe of Florida; Seneca Nation of Indians; Shinnecock Indian Nation;

Association (CNIGA) is a non-profit organization comprised of federally recognized tribal governments and is dedicated to protecting the sovereign right of Indian tribes to have gaming on federally recognized Indian lands, and *amicus* Tribal Alliance of Sovereign Indian Nations (TASIN) is an intergovernmental association of tribal governments in Southern California.[3]

Amici Tribes and USET member Tribal Nations (collectively "*Amici* Tribes") have a strong interest in this case because of its potential impact on the scope of immunity for tribal officials and employees and the range of core sovereign interests that immunity protects.[4] But *Amici* Tribes' interest in this case also extends to its potential impact on a wide array of negotiated intergovernmental agreements and tribal laws that govern *Amici* Tribes' working relationships with their sister governments and commitments to individual state and tribal citizens, and which specify tort remedies and immunity waivers as negotiated

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Saint Regis Mohawk Tribe; Tunica-Biloxi Tribe of Louisiana; and Wampanoag Tribe of Gay Head (Aquinnah).

[3] CNIGA member Tribes are listed at: http://www.cniga.com/members/tribes.php. TASIN member Tribes are listed at: http://www.tasin.org/about-us/our-tribal-communities.

[4] The United States as *amicus curiae* has taken the position in this case that official immunity, rather than sovereign immunity, applies to tribal officials and employees sued in their personal capacities. While *Amici* Tribes assert that tribal sovereign immunity extends to the actions of tribal officials and employees acting within the scope of their authority on behalf of the Tribe, official immunity functions to protect many of the same core sovereignty interests and the end result is largely the same. In contrast, Petitioners wrongly argue that *no* immunity is available to tribal officials and employees and that individual capacity suits against them ought to be permitted without limitation.

between the sovereigns and as appropriate to the specific parties and their situations. These agreements include Tribal-State gaming compacts entered into under the Indian Gaming Regulatory Act, 25 U.S.C. § 2701 *et seq.* (IGRA), through which Congress has preempted the field of Indian gaming. Under the IGRA, Tribes and States that wish to negotiate remedies for tort claims related to Class III gaming must use the Tribal-State compact process.

Amici Tribes' various intergovernmental agreements and tribal laws, including their mandatory IGRA compacts, effectively address the problem that Petitioners ask this Court to solve: access to tort remedies for individuals alleging harm by a tribal employee. Petitioners ignore the existence of IGRA compacts and other intergovernmental agreements and tribal laws addressing tort remedies when they falsely claim that Tribes have attempted to unilaterally exempt themselves from tort liability and that tort victims would routinely be left without a remedy unless this Court holds that individual capacity suits are permitted as an exception to tribal immunity. And while negotiated intergovernmental agreements can and do address these questions with sensitivity to the specific situation and needs of the parties (and, in so doing, encourage better working relationships between Tribes and state and local governments), the ruling sought by Petitioners would do the opposite: Petitioners request the creation of a broad exception to (and an end-run around) immunity for tribal employees that would upend the careful balance struck in *Amici* Tribes' existing agreements with state and local governments and destabilize the working relationships between Tribes and those entities through sweeping and sudden legal changes inconsistent with the IGRA and other settled law.

Amici believe that this brief will aid the Court by illustrating how Tribes and States regularly deal with questions of immunity and tort remedies in a variety of contexts, including but not limited to tort claims against employees of tribal gaming establishments. In cases such as this one involving actions connected to Indian gaming, *Amici* Tribes believe that Petitioners' position is precluded by the IGRA and its Class III compact requirements, and that the Court should decide this case on those narrow grounds. Alternatively, *Amici* Tribes hope to aid the Court in understanding the ruinous impacts to existing and future negotiated agreements and intergovernmental relationships that would be caused by the much broader ruling Petitioners seek. Such a ruling would open the floodgates for non-negotiated, state court remedies against tribal officials and employees without any limitations whatsoever, essentially voiding negotiated intergovernmental agreements addressing tort remedies in any context and, in the case of gaming-related disputes, violate the statutory structure set forth by Congress in the IGRA.

SUMMARY OF ARGUMENT

Petitioners argue that the decision below "gives tribal employees an absolute immunity from suit that undermines the State's interest in deterring wrongful conduct and tort victims' interest in receiving compensation for their injuries." Pet. Br. 2.[5] They also imply that the tribal court remedy available to them in this case was adopted by the Tribe in a unilateral attempt to curtail the Petitioners' rights, stating: "While the

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[5] Petitioners elsewhere state that "barring state-law tort actions against individual tribal employees would represent an unwarranted intrusion on state regulatory authority and would deprive tort victims of compensation." Pet. Br. 6.

Tribe has the authority to limit the jurisdiction of its own courts, it may not limit the jurisdiction of the Connecticut courts, and it may not strip petitioners of their state-law rights by insulating Clarke from liability for his off-reservation conduct." Pet. Br. 29. Finally, Petitioners broadly assert that permitting state-law individual capacity suits against tribal employees is "the only way to deter tortious conduct" because tribal enterprises will otherwise "not be forced to internalize the cost of [their] misconduct." Pet. Br. 27.

The Petitioners' suggestion that a broad, systemic problem exists with respect to the protection of state interests and access to tort remedies in situations like those involved in the instant case is simply false. Also false is the Petitioners' assertion that the Tribe in this case attempted to unilaterally undermine state procedural rights that would otherwise be available to them.

The reality is quite different. Against the backdrop of sovereign and official immunity as established by federal law, Tribes regularly enter into intergovernmental agreements with States and their subdivisions that address both state and tribal interests in providing remedies for tort victims and protecting tribal and state citizens against uncompensated injury. In cases like this one involving disputes connected to Class III gaming, Congress mandated in the IGRA that these questions be left to negotiations between tribal and state sovereigns to establish the balance of tribal, federal and state interests—including remedies for torts—in Tribal-State compacts that must be approved

or deemed approved by the federal government.[6] This gives all States with Tribes seeking to offer Class III gaming within their borders the opportunity to negotiate immunity waivers or alternative protections for tort victims as the State deems necessary and appropriate. In contrast, allowing individual capacity actions against tribal employees acting in connection with tribal gaming activities without such an agreement would be a violation of the exclusive and specific legislative scheme in the IGRA that preempts any such actions unless authorized by Tribal-State compacts.

Apart from the IGRA, *Amici* Tribes, like other Tribes across the country, routinely enter into negotiated intergovernmental agreements that address issues of mutual concern, like public safety and mutual aid, and improve working relationships between Tribes and state and local governments. These agreements result in improved local services for state and tribal citizens alike, and are generally far more effective for long-term intergovernmental cooperation than winner-takes-all lawsuits. When these agreements are negotiated, as with IGRA compacts, the State acts on behalf of its citizens to ensure access to appropriate remedies while also reaping the benefits of intergovernmental cooperation and resource-sharing.[7]

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[6] 25 U.S.C. § 2710(d)(3) provides that Tribal-State compacts shall take effect (permitting the Tribe to engage in Class III gaming) "only when notice of approval by the Secretary of such compact has been published by the Secretary in the Federal Register." *See also*, 25 U.S.C. § 2710(d)(8)(C) (Tribal-State compact is deemed approved if the Secretary does not act to approve or disapprove the compact within 45 days, but only to the extent not inconsistent with the IGRA).

[7] Petitioners argue that it would be unfair to require a tort victim to follow a claims procedure that it has not specifically

Even when the Tribe has no occasion to negotiate such matters with a State, Tribes routinely provide for tort remedies as a matter of tribal law. Particularly where a Tribe operates a gaming enterprise or other business that relies on significant interactions with non-Indians, Tribes understand that remedial processes and tort compensation must be made available as a matter of good business, even if federal rules would otherwise permit blanket immunity. Even Tribes that do not have a formal tribal court system in place can and do exercise their sovereign authority to create administrative procedures for tort victims; in some cases, they have agreed to limited sovereign immunity waivers for state court suits in certain circumstances.

The wholesale abrogation of immunity for tribal officials and employees sought by the Petitioners in this case is not only unnecessary to ensure access to tort remedies, but it would both undermine Congressional intent of the IGRA in cases like this one *and* upset the balance of intergovernmental agreements that provide significant benefits to both tribal and state sovereigns in many other contexts. Simply put,

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negotiated with the Tribe or agreed to in advance (i.e., through a contract with the Tribe). Pet. Br. 28-29. However, would-be tort victims are not entitled to personally negotiate with a state sovereign over specific remedies or procedures to which they will be bound in the event of injury by a state employee, either. This is acceptable because individual citizens may rely on representation of their interests through the State's political process. When a State has the opportunity to negotiate with a Tribe over matters including relief for tort victims, the interests of individual state citizens in ensuring fair compensation for injury are protected to the same degree. There is no rational basis for demanding an individual consent requirement.

the ruling sought by Petitioners is a poor solution to a problem that, in fact, rarely even exists.

ARGUMENT

I. Congress has acted through the IGRA to establish that negotiated Tribal-State gaming compacts are the exclusive vehicle for negotiating matters relating to Class III gaming, including immunity waivers and remedies for gaming-related torts like the one at issue in this case.

In this case, the Petitioners have alleged injury as a result of tortious conduct committed by an employee of the Mohegan Tribal Gaming Authority, the arm of the Mohegan Tribe responsible for operating the Mohegan Sun Casino. In order to offer Class III gaming at the Mohegan Sun Casino, the Mohegan Tribe was required to negotiate and enter into a Tribal-State gaming compact with the State of Connecticut under the IGRA, which in turn had to be approved by the federal government before taking effect. 25 U.S.C. § 2710(d). Like many Tribal-State gaming compacts, the compact between the Mohegan Tribe and the State of Connecticut includes a negotiated provision addressing tort remedies.[8] Pursuant to that provision

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[8] In the case of the Mohegan Tribe, the Tribal-State compact provides as follows:

> (g) Tort remedies for patrons. The Tribe shall establish, prior to the commencement of class III gaming, reasonable procedures for the disposition of tort claims arising from alleged injuries to patrons of its gaming facilities. The Tribe shall not be deemed to have waived its sovereign immunity from suit with respect to such claims by virtue of any provision of this Compact, but may adopt a remedial system analogous to that available for similar claims arising against the

(which requires the Tribe to consult with the state gaming agency) and its own tribal laws, the Mohegan Tribe created a tribal court remedy that is even broader than the compact requires and was available to the Petitioners in this case to seek redress for their grievances. *See* MOHEGAN TRIBE OF INDIANS CODE, Ch. 3, Art. 2, § 3-21 *et seq.* (Sept. 30, 2016).

Indeed, remedies for the type of tortious activity alleged in this case (i.e., by an employee of a tribal gaming operation) are within the scope of matters that Congress provided may be negotiated and delineated in a Tribal-State compact under the IGRA. The IGRA, including its Class III compact requirement, is a comprehensive federal scheme completely preempting the area of tribal gaming activities. *See, e.g.*, *Tamiami Partners, Ltd.* v. *Miccosukee Tribe of Indians*, 63 F.3d 1030, 1033 (11th Cir. 1995) ("The occupation of this field by [IGRA] is evidenced by the broad reach of the statute's regulatory and enforcement provisions and is underscored by the comprehensive regulations promulgated under the statute."); *Cabazon Band of Mission Indians v. Wilson*, 37 F.3d 430, 433-35 (9th Cir. 1994) (IGRA preempts state license fee based on wagers at Indian gaming facilities); *Alabama v. PCI*

> State or such other remedial system as may be appropriate following consultation with the State gaming agency.

Tribal-State Compact between the Mohegan Tribe and the State of Connecticut § 3(g) (last updated July 11, 2011), http://www.ct.gov/dcp/lib/dcp/pdf/gaming/tribal_state_compact_mohegan%5b1%5d.pdf. To the extent the parties chose not to address every possible gaming-related tort claim against the Tribe or its employees in this negotiated provision, the parties chose to leave existing laws (including the federal rules of tribal and official sovereign immunity) intact and to leave it to the Tribe to determine the proper remedy in those cases.

Gaming Auth., 15 F. Supp. 3d 1161, 1170-72 (M.D. Ala. 2014), *aff'd on other grounds*, 801 F.3d 1278, 1286 n.17 (5th Cir. 2015).[9]

There is no doubt that Congress intended to establish a regulatory scheme for Class III gaming that allows States and Tribes to negotiate various issues concerning the operation of Class III casinos, including remedies for the State's citizens to seek compensation for injuries allegedly suffered in connection with such gaming activities. At the same time, Congress required that a State's asserted interest in such matters be addressed in a Tribal-State compact as opposed to any other vehicle. As the Eighth Circuit has held:

> The legislative history indicates that Congress did not intend to transfer any jurisdictional or regulatory power to the states by means of IGRA unless a tribe consented to

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[9] Federal preemption depends on congressional intent and may be either express or implied:

> Absent explicit pre-emptive language, Congress' intent to supersede state law altogether may be inferred because "[t]he scheme of federal regulation may be so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it," because "the Act of Congress may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject," or because "the object sought to be obtained by federal law and the character of obligations imposed by it may reveal the same purpose."

Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta, 458 U.S. 141, 152–53 (1982) (internal citations omitted; modifications in original). These principles apply even in matters that are normally "of special concern to the States." *Id.* at 153.

> such a transfer in a tribal-state compact. . . . Congress thus left states with no regulatory role over gaming except as expressly authorized by IGRA, and under it, the only method by which a state can apply its general civil laws to gaming is through a tribal-state compact. Tribal-state compacts are at the core of the scheme Congress developed to balance the interests of the federal government, the states, and the tribes. . . . The statute itself and its legislative history show the intent of Congress that IGRA control Indian gaming and that state regulation of gaming take place within the statute's carefully defined structure. We therefore conclude that IGRA has the requisite extraordinary preemptive force necessary to satisfy the complete preemption exception to the well-pleaded complaint rule.

Gaming Corp. of Am. v. Dorsey & Whitney, 88 F.3d 536, 545-47 (8th Cir. 1996).

The IGRA defines what can be included in the scope of Class III gaming compacts as follows:

> (i) the application of the criminal and civil laws and regulations of the Indian tribe or the State that are directly related to, and necessary for, the licensing and regulation of such activity;
>
> (ii) the allocation of criminal and civil jurisdiction between the State and the Indian tribe necessary for the enforcement of such laws and regulations;

> (iii) the assessment by the State of such activities in such amounts as are necessary to defray the costs of regulating such activity;
>
> (iv) taxation by the Indian tribe of such activity in amounts comparable to amounts assessed by the State for comparable activities;
>
> (v) remedies for breach of contract;
>
> (vi) standards for the operation of such activity and maintenance of the gaming facility, including licensing; and
>
> (vii) any other subjects that are directly related to the operation of gaming activities.

25 U.S.C. § 2710(d)(3)(C). *See also Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2028–29 (2014) ("A tribe may conduct such [Class III] gaming on Indian lands only pursuant to, and in compliance with, a compact it has negotiated with the surrounding State. A compact typically . . . allocates law enforcement authority between the tribe and State, and provides remedies for breach of the agreement's terms.") (internal citations omitted). Pursuant to 25 U.S.C. § 2710(d)(8)(B), the Secretary may disapprove a compact that has been negotiated between and agreed to by a Tribe and State only if it violates the IGRA, any other provision of Federal law, or the trust obligation of the United States to Indians.[10]

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[10] For example, compacts and compact amendments have been disapproved by the Secretary on the grounds that they purported to address issues entirely unrelated to gaming, such as hunting and fishing rights and land title issues, Letter from Kevin K. Washburn, Assistant Sec'y–Indian Affairs, to the Hon. Deval Patrick, Governor of the Commonwealth of Mass. 7-9 (Oct. 12,

Under these guidelines, at least seventeen different States have negotiated express provisions in Tribal-State compacts to address tort remedies for activity connected to Class III gaming.[11] A review of the seventeen different States' compacts establishes that the matter of tort remedies is fully vetted, negotiated between sovereign Tribes and sovereign States, and approved or permitted to go into effect by the United States government. There is no boilerplate provision. Each State negotiated for its own best interests, including the protection of those injured as the result of negligence by the gaming operation and/or its employees. The provisions vary as to requirements for mandatory liability insurance,[12] for example, and

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2012), https://www.indianaffairs.gov/cs/groups/webteam/documents/text/idc1-028222.pdf; because they would have limited the use of trust property to gaming and casino operation activities only, Letter from Donald Laverdure, Principal Deputy Assistant Sec'y–Indian Affairs, to the Hon. Kimberly M. Vele, President, Stockbridge-Munsee Cmty. of Mohican Indians 1-2 (Feb. 18, 2011), https://www.indianaffairs.gov/cs/groups/xoig/documents/text/idc1-024497.pdf; and because they contained revenue sharing provisions that would have amounted to an impermissible tax, fee, charge, or other assessment on the Tribe, *e.g.*, Letter from Larry Echo Hawk, Assistant Sec'y–Indian Affairs, to the Hon. Sherry Treppa, Chairperson, Habematolel Pomo of Upper Lake (Aug. 17, 2010), https://www.indianaffairs.gov/cs/groups/xoig/documents/text/idc1-024698.pdf.

[11] All compacts that have not been disapproved by the Department of the Interior are available on the Department's official web page, http://www.indianaffairs.gov/WhoWeAre/AS-IA/OIG/Compacts/index.htm.

[12] *See, e.g.*, Tribal-State Compact between the Mashpee Wampanoag Tribe and the Commonwealth of Massachusetts Part 20 (2014) (requiring Tribe to maintain public liability insurance up to specified minimum limits), http://www.indianaffairs.gov/cs/groups/webteam/documents/document/idc1-028231.pdf; Class III Gaming Compact between the Sac and Fox Nation

limited waivers of tribal sovereign immunity.[13] Some States have even negotiated specifics such as forum or court,[14] application of certain bodies of law,[15] applicable statutes of limitation,[16] and the awarding of punitive damages and attorney fees.[17] In each case,

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of Missouri in Kansas and Nebraska and the State of Kansas § 3(E) (1995) (same), http://www.indianaffairs.gov/cs/groups/xoig/documents/text/idc1-025967.pdf.

[13] *See, e.g.*, Gaming Compact between the Seminole Tribe of Florida and the State of Florida Part VI.D.5 (2010) (limited waiver of sovereign immunity for state court tort claims with tribal administrative exhaustion requirement), http://www.indianaffairs.gov/cs/groups/xoig/documents/text/idc1-026001.pdf; Tribal State Compact between the Cherokee Nation and the State of Oklahoma § 8(b) (2010) (waiver of sovereign immunity for tribal court tort claims up to specified limits of public liability insurance), http://www.indianaffairs.gov/cs/groups/xoig/documents/text/idc1-024697.pdf.

[14] *See, e.g.*, Seminole Tribe Compact, *supra* note 13, at Part VI.D.4 (providing that claimants may bring tort claim "in any court of competent jurisdiction in the county in which the incident alleged to have caused injury occurred" if prerequisites to suit are met).

[15] *See, e.g.*, Tribal State Gaming Compact between the Prairie Band Potawatomi Nation in Kansas and the State of Kansas § 3(D) (1995) (applying the Kansas Tort Claims Act to the extent not inconsistent with the IGRA or tribal law), http://www.indianaffairs.gov/cs/groups/xoig/documents/text/idc1-025966.pdf.

[16] *See, e.g.*, Tribal Gaming Compact between the Absentee Shawnee Tribe of Oklahoma and the State of Oklahoma Part 6.A.4 (2004) (notice of tort claim must be submitted to Tribe within one year, or claim shall be barred; judgment shall be reduced by 10% if claim filed after 90 days but within one year), http://www.indianaffairs.gov/cs/groups/xoig/documents/text/idc-038404.pdf.

[17] *See, e.g.*, Tribal-State Compact between the State of California and the Santa Ynez Band of Mission Indians §§ 12.5(b)(1), (2) (2015) (Tribe not required to agree to provide

the State is given a meaningful opportunity to ensure that viable enforceable remedies are available to allegedly injured parties in accordance with state policy interests.

Tort remedies are one of several concessions a State can seek from a Tribe in exchange for the ability to conduct Class III gaming within state borders under the IGRA, and the Class III compact requirement provides a powerful incentive for Tribes to negotiate fair and effective remedies. Congress intentionally relied on this balance of interests in enacting the IGRA, choosing the compacting method over more rigid and intrusive extensions of state authority over Indian gaming and related activities. S. REP. NO. 100-446, at 13-14 (1988), *reprinted in* 1988 U.S.C.C.A.N. 3071, 3083-84.[18] By the same token, it is incumbent on a State to use the compact negotiation process to protect its own interests and those of its citizens and to negotiate for changes to the default rules of sovereign and official immunity if the State deems such changes necessary.[19]

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punitive damages and tort ordinance may preclude any awards of attorney's fees), http://www.cgcc.ca.gov/documents/compacts/AMENDED_COMPACTS/Santa%20Ynez%20Compact%202015%20(3).pdf.

[18] *See also* S. REP. NO. 100-446 at 13 (explaining that "[a]fter lengthy hearings, negotiations and discussions, the Committee concluded that the use of compacts between tribes and states is the best mechanism to assure that the interests of both sovereign entities are met with respect to the regulation of [Class III gaming.]"); *id.* at 6.

[19] It is noteworthy that while the IGRA establishes federal standards for gaming on Indian lands, the scope of Tribal-State compacts under the IGRA extends to matters that are related to such gaming, including off-reservation impacts that may be of concern to the States. For instance, *amicus* Santa Ynez Band of

Like many other Tribes, several of the *Amici* Tribes are required by their Tribal-State compacts to provide various negotiated remedies for tort claims against them and their employees acting in the course of their authority in connection with the Tribes' gambling operations. For example, to meet the obligations under its Tribal-State compact with the State of California, *amicus* Santa Ynez Band of Chumash Indians provides and pays for an insured non-judicial mechanism for the payment of tort claims for negligent acts of their employees and agents in connection with the Tribe's gaming activities. Santa Ynez Band Compact, *supra* note 17, at § 12.5. The Tribe further agreed to a limited waiver of tribal sovereign immunity to allow such remedies. *Id.* The scope of this remedy is expansive and extends to "any claim for bodily injury, personal injury, or property damage, arising out of, connected with, or relating to the operation of the Gaming Operation, Gaming Facility, or the Gaming Activities, including, but not limited to, injuries resulting from entry onto the Tribe's land for purposes of patronizing the Gaming Facility or providing goods or services to the Gaming Facility[.]" *Id.* at § 12.5(a) (scope of required insurance coverage); *id.* at § 12.5(b)(1) (scope of tribal ordinance).[20]

Chumash Indians' compact includes provisions relating to off-reservation environmental impacts and encourages intergovernmental agreements to address those impacts, including, for example, traffic impacts to state highways. Santa Ynez Band Compact, *supra* note 17, at § 11.

[20] Under the first negotiated IGRA compact between *amicus* Santa Ynez Band and the State of California, the Tribe limited tort claims damages to twice the amount of medical bills incurred by the claimant. As a result of re-negotiations with the State, however, there is no such limitation in the recently negotiated compact.

Some negotiated compact provisions require the Tribe to adopt state laws. For example, for purposes of patron tort claims, *amicus* Prairie Band Potawatomi Nation agreed to adopt the Kansas Tort Claims Act to the extent not inconsistent with the IGRA or tribal law, with some exceptions. Prairie Band Potawatomi Nation Compact, *supra* note 15, at § 3(D). The compact further sets required levels for liability insurance and requires the policy to include an endorsement providing that the insurer may not invoke tribal sovereign immunity up to those limits. *Id.* at § 3(E). In addition, the compact requires the Tribe to indemnify state officials and employees, as follows:

> The Tribe shall indemnify, defend and hold harmless the State, its officers, directors, employees and agents from and against any claims, damages, losses or expenses asserted against or suffered or incurred by the State or its officers, directors, employees and agents (except as may be the result of their own negligence) based upon or arising out of any bodily injury or property damage resulting or claimed to result in whole or in part from any act or omission of the Tribe relating to the inspection of any gaming-related facilities, or any rectification thereof, pursuant to this Compact or applicable tribal law regarding public health, safety and welfare.

Id.

Like the Prairie Band's compact, *amicus* Lac du Flambeau Band of Lake Superior Chippewa's gaming compact requires the Tribe to maintain public liability insurance within certain limits; requires an endorsement prohibiting the insurer from invoking tribal sovereign immunity up to those limits; and

requires the Tribe to indemnify the State and its officers or employees from certain claims relating to the inspection of gaming or gaming related facilities. Lac du Flambeau Band of Lake Superior Chippewa Indians and State of Wisconsin Gaming Compact § XIX (1992).[21]

In other compact provisions, Tribes and States have agreed to permit state court proceedings to varying degrees, like the Gaming Compact between *amicus* Seminole Tribe of Florida and the State of Florida, which includes a tort claims procedure applicable to patrons alleging injury in any facility where games covered by the Compact are played. Seminole Tribe Compact, *supra* note 13, at Part VI.D. The Tribe's compact adopts an administrative procedure through which written notice of the claim must be provided to the Tribe and the Tribe's insurance carrier must seek to resolve the claim. In the event the claim cannot be resolved by the insurance carrier, the Compact provides as follows:

> If the Patron and the Tribe and the insurance carrier are not able to resolve the claim in good faith within one (1) year after the Patron provided written notice to the Tribe's Risk Management Department or the Facility, the Patron may bring a tort claim against the Tribe in any court of competent jurisdiction in the county in which the incident alleged to have caused injury occurred, as provided in this Compact, and subject to a four (4) year statute of limitations, which shall begin to run from the date of the incident of the

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[21] The Lac du Flambeau Band's compact is available at https://www.bia.gov/cs/groups/xoig/documents/text/idc1-025284.pdf.

> alleged claimed injury. A Patron's notice of injury to the Tribe pursuant to Section D.1. of this Part and the fulfillment of the good faith attempt at resolution pursuant to Sections D.2. and 4. of this Part are conditions precedent to filing suit.

Id. at Part VI.D.4. The Compact also includes a limited waiver of tribal sovereign immunity for such suits (to the same extent as the State of Florida waives its immunity for tort claims),[22] but specifies that claims shall be brought against the Tribe as the sole party in interest, not against tribal employees. *Id.* at Part VI.D.5.

Similar to the Seminole Tribe's compact, USET member St. Regis Mohawk Tribe's compact agrees to designate the state courts as the forum for personal injury claims. The compact requires the Tribe to maintain liability insurance and provides that the "[c]ourts of the State of New York shall adjudicate claims for personal injury to patrons of Gaming Facilities pursuant to 25 U.S.C. Section 233[,]" which provides the courts of the State of New York with

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[22] Like the Seminole compact, the Oklahoma model compact, entered into by several Tribes including *amici* Cheyenne and Arapaho Tribes and Absentee-Shawnee Tribe of Indians of Oklahoma, includes a limited waiver of sovereign immunity but requires that an administrative process be followed as a precondition to any suit. *E.g.*, Tribal Gaming Compact between the Cheyenne-Arapaho Tribes of Oklahoma and the State of Oklahoma Part 6 (2005), https://www.indianaffairs.gov/cs/groups/xoig/documents/text/idc-038408.pdf. The administrative process requires submission of a written claim notice to the Tribe within one year of the incident alleged to have caused injury, and the compact provides that claims that do not follow the administrative procedures shall be barred. *Id.* at Parts 6.A.4, 6.A.10.

jurisdiction in civil actions between Indians and between Indians and other persons. Tribal-State Compact between the St. Regis Mohawk Tribe and the State of New York § 3(g) (1995);[23] 25 U.S.C. § 233. In contrast, USET member Seneca Nation of Indians—also located in New York—agreed in its Tribal-State compact to provide its own procedures for personal injury claims against (and to maintain public liability insurance insuring) the Nation's gaming operation, as well as its agents and employees specifically. Nation-State Gaming Compact between the Seneca Nation of Indians and the State of New York § 9 (2002).[24]

Amici Tribes' compacts illustrate (but do not exhaust) the range of negotiated provisions that may be available to resolve questions over the availability of tort remedies for state citizens affected by tribal gaming activities, above and beyond the default federal rules of immunity. To permit non-negotiated, state court remedies against individual employees would both effectively nullify these and other negotiated compact agreements under the IGRA and undermine the longstanding requirement that parties exhaust available tribal remedies before seeking relief in state or federal court. *See, e.g., Drumm v. Brown*, 716 A.2d 50 (Conn. 1998).[25] Though the tribal

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[23] The St. Regis Mohawk Tribe's compact is available at http://www.indianaffairs.gov/cs/groups/xoig/documents/text/idc1-025714.pdf.

[24] The Seneca Nation's compact is available at https://www.indianaffairs.gov/cs/groups/xoig/documents/text/idc-038394.pdf.

[25] This Court has often stated the rule requiring the exhaustion of available tribal remedies prior to seeking relief in federal courts. *E.g., Nat'l Farmers Union Ins. Cos. v. Crow Tribe*, 471 U.S. 845 (1985). In *Iowa Mut. Ins. Co. v. LaPlante*, this Court

remedies provided in Tribal-State compacts may vary, in each case they offer an available process that both the Tribe and State have agreed is fair and adequate, and that the federal government has approved or deemed approved under federal law. They cannot simply be ignored by claimants preferring an alternate forum.

Contrary to clear congressional intent, accepting the Petitioners' arguments in this case would render negotiated Tribal-State compact provisions and the tort remedies required thereunder meaningless by providing an alternative, judicially created remedy outside the scope of compact negotiations. The IGRA does not permit that result, and provides this Court with clear and narrow grounds on which to rule in this case.[26]

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also said: "If state-court jurisdiction over Indians or activities on Indian lands would interfere with tribal sovereignty and self-government, the state courts are generally divested of jurisdiction as a matter of federal law." 480 U.S. 9, 15 (1987) (citing *Fisher v. District Court*, 424 U.S. 382 (1976)).

[26] Given the preemptive role of the IGRA in this case, it is easily distinguished from *Maxwell v. County of San Diego*, 708 F.3d 1075 (9th Cir. 2013), the case primarily relied upon by Petitioners in this case but not involving tribal gaming employees. Accordingly, the Court need not reach the validity of that decision. *Amicus* Tribes believe that *Maxwell* was wrongly decided, but it should be emphasized that IGRA preemption did not apply in that case—something Petitioners have overlooked in their argument. Compare *Maxwell* with *Cook v. AVI Casino Enters., Inc.*, 548 F.3d 718, 727 (9th Cir. 2008) (holding that tribal sovereign immunity extended to employees of tribal gaming enterprise because the sovereign entity is the real, substantial party in interest).

II. Tort remedies and immunity waivers are also commonly negotiated in a range of other intergovernmental agreements that advance both state and tribal interests.

Of course, the ruling sought by the Petitioners in this case is so broad that it would permit state court suits not only against employees of tribal gaming enterprises, but against any tribal official or employee for any action in connection with official tribal business or employment. As in the gaming context, however, Tribes and state and local governments already address questions of tort liability in negotiated agreements that provide important benefits to both sovereigns and their citizens, and which would be disrupted and perhaps destroyed by the ruling Petitioners seek.

For example, several Tribes in Washington State, including *amicus* Suquamish Tribe, have joined with local and state governmental counterparts to form a regional intergovernmental agreement for public health response purposes in the event of a public health incident like a disease outbreak, regional emergency, or natural disaster requiring sharing of health care and public health services (the "Olympic Regional Agreement").[27] This mutual aid agreement enables tribal or regional health departments to call for the healthcare resources of all participating parties to respond to incidents as needed. The agreement provides that there will be a unified "command and control" system in which a Tribe would affirmatively

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[27] Olympic Regional Tribal-Public Health Collaboration and Mutual Aid Agreement (2014), http://www.aihc-wa.com/files/2011/09/Olympic-Regional-Tribal-Public-Health-Mutual-Aid-Agreement1.pdf.

allow a non-tribal health officer to exercise state-derived public health authority over the Tribe's land and citizens (authority that may include, but is not limited to, isolation and quarantine of patients, emergency response, or special waste control activities). Olympic Regional Agreement, at Art. IX. The responding personnel would be a mixture of tribal and non-tribal health officials and healthcare workers. *Id.* at Art. X. The need for such an agreement is manifest in the Pacific Northwest, where some tribal health facilities are the only ones available within many miles to serve both Native and non-Native individuals and communities. It is equally important to delineate jurisdiction and authority in those tribal communities that lie within or adjacent to metropolitan areas to ensure that gaps in coverage of tribal communities do not render public health or disaster responses ineffective.

The Olympic Regional Agreement addresses liability and claims. The agreement explicitly states that it does not constitute a waiver of applicable sovereign immunity (for the participating Tribes and local or state agencies), and leaves untouched any tort claims acts that may apply. *Id.* at Art. XIII. The agreement also contains a provision for mutual defense and indemnification when there is no applicable immunity, as well as an agreement to participate in legal proceedings when requested by another party. *Id.* The parties to the Olympic Regional Agreement have attempted to both maintain the status quo of immunity and liability that normally applies to the parties, and also provide a safety net of indemnification if immunity and liabilities are in question and something goes wrong.

The ruling Petitioner seeks would endanger the ability of Tribes and local governments—like those in the Olympic Regional Agreement—to respond to emergencies in a unified and effective way. As a primary concern, such a ruling would remove the immunity protections applicable to tribal employees, and make them (and their Tribes) particularly vulnerable to lawsuits that may arise from an emergency public health response. Potentially, if Petitioners' argument were accepted, agreements like this one could burden all signatories with the need to defend against claims that would otherwise be precluded. At the very least, the preferred solution of the Tribes and local governments in this case to maintain immunity and liability through their negotiated agreement would be disregarded under the ruling sought by Petitioners.

The scope of tort remedies available to non-Indians likely to interact with tribal employees as a result of tribal business with or within the State is a prime subject for intergovernmental agreements. The circumstances and considerations involved—e.g., the various interests of the Tribe and state or local governments at stake, the category of tribal employee likely to be involved and the scope of their duties, the locus of activity, the purposes for which that activity is carried out and the costs and benefits to the Tribe, State, and the public of the activity, among other factors—are different in each case. In the context of an intergovernmental agreement, Tribes and state or local governments each have the opportunity to protect their legitimate sovereign interests, and individual state citizens are also protected because the state or local government negotiates and enters into a consensual, mutually beneficial agreement with the Tribe on their behalf. These agreements, as a general

matter, provide an opportunity for creative problem-solving and are likely to lead to stronger working relationships between Tribes and state and local governments, leading to better services and outcomes for local residents.[28]

In contrast, the broad ruling sought by Petitioners is a blunt instrument that would cause a great deal of collateral damage in seeking to address a largely non-existent problem. Apart from the impact to Tribes of effectively eviscerating tribal sovereign immunity by offering individual capacity suits as an end-run around it, such a ruling would both upend existing intergovernmental agreements and upset the balance of interests that incentivizes the parties to come together to address pressing local issues of shared concern.[29]

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[28] *See, e.g.*, COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 6.05 at 588-89 (Nell Jessup Newton, ed., 2012) [hereinafter, COHEN'S HANDBOOK]:

> In the face of potentially overlapping or conflicting jurisdictional claims, tribal-state cooperative agreements offer both sets of governments the opportunity to coordinate the exercise of authority, share resources, reduce administrative costs, deliver services in more efficient and culturally appropriate ways, address future contingencies, and save costs of litigation. They also enable governments to craft legal arrangements reflecting the particular circumstances of individual Indian nations, rather than relying on uniform national rules. Insofar as cooperative agreements create a stable legal environment conducive to economic development, they may appeal to the common interests of tribes and states.

[29] *See, e.g.*, *Wagnon v. Prairie Band Potawatomi Nation*, 546 U.S. 95, 131 (2005) (Ginsburg, J., dissenting) ("By truncating the balancing-of-interests approach, the Court has diminished prospects for cooperative efforts to achieve resolution of taxation

III. Even where Tribes are under no obligation to negotiate, tribal laws generally provide tort remedies as a matter of good governance and smart business.

Tribes know that the provision of meaningful tort remedies for actions involving tribal employees is necessary to preserve and advance their working relationships with other governments, potential investors and business partners, patrons of tribal businesses, and their own citizens. As a result, even when Tribes have no occasion or are under no obligation to negotiate with state and local governments to provide tort remedies to state citizens, Tribes generally act to ensure that parties injured in the course of dealings with the Tribe and its officials or employees will have access to effective, meaningful remedies. Tribes carefully calibrate these remedies to provide recourse to injured parties in a fair and equitable manner while at the same time protecting the sovereign interests and financial resources of the Tribe. Far from being a unilateral attempt to insulate themselves from liability, as the Petitioners wrongly characterize the Mohegan Tribe's tort ordinance, these tribal laws and policies are adopted against the backdrop of federal rules of immunity and open up remedies that otherwise would not be available, much like state and federal tort measures enacted to ensure fair compensation for victims of governmental torts.

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issues through constructive intergovernmental agreements."); COHEN'S HANDBOOK § 6.05 at 589-90 (Tribes may be reluctant to enter into cooperative agreements where they lack sufficient bargaining power to achieve their goals).

For example, the Eastern Band of Cherokee Indians (a USET member Tribal Nation), through its civil procedure code, grants the tribal court jurisdiction to hear tort claims brought against the Tribe, while protecting the Tribe's limited resources by extending the jurisdiction only to those claims for which the Tribe maintains insurance coverage.[30] Further, recovery on tort claims is limited to the amount of liability coverage. The Tribe has made a decision to open its courts to tort claims in order to provide a venue (and potential remedy) for plaintiffs seeking to recover against the Tribe.[31]

Likewise, while *amicus* Kickapoo Traditional Tribe of Texas does not currently engage in Class III gaming pursuant to an IGRA compact, the Tribe conducts Class II gaming pursuant to a tribal gaming ordinance approved by the federal National Indian Gaming Commission that includes a dispute resolution provision for patron claims. KICKAPOO TRADITIONAL TRIBE OF TEXAS GAMING ORDINANCE § 113 (2006).[32] Pursuant to that provision, patrons have the right to submit claims to the Tribal Gaming Commission, which shall hold a hearing (at which the claimant may have counsel present) within 30 days. *Id.* Recovery is limited to the amount of actual proven damages in

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[30] EASTERN BAND OF CHEROKEE INDIANS CODE, Part II, Ch. 1, Art. 1 § 1-2(g)(3) (2016), https://www.municode.com/library/nc/cherokee_indians_eastern_band/codes/code_of_ordinances?nodeId=13359.

[31] *See Welch v. Eastern Band of Cherokee Indians*, 6 Cher. Rep. 20, 2007 WL 7079613 at *5 (Eastern Cher. Ct. App. 2007) (denying motion to dismiss tort claims against Tribe).

[32] The Kickapoo Traditional Tribe's gaming ordinance is available at http://www.nigc.gov/images/uploads/gamingordinances/kickapootraditionaltrbtx-kickapootribeord121806.pdf.

order to protect tribal resources. *Id.* *Amicus* Lytton Rancheria, which also conducts Class II gaming only, has elected to permit tort claims through a claims process involving the Tribe's insurance administrator. These *Amici* Tribes, like other Tribes across the country, understand the importance of addressing personal injury claims as a matter of good business and tribal governance. As a result, non-Indians injured in the course of interactions with tribal employees are simply not, as a general rule, left without a remedy as a result of tribal immunity.

CONCLUSION

In taking steps to ensure that meaningful remedies are available to parties injured by the actions of tribal officials and employees acting within the scope of their authority, Tribes negotiate the content and scope of those remedies with their sister governments and craft responsive tribal laws in a manner that balances individual protections with other tribal and state sovereign interests. Contrary to the Petitioners' representations, it is a rare situation (and one not presented in this case) where a tort victim truly lacks any meaningful remedy. This Court should not be swayed by the Petitioners' misleading appeals to invented fairness concerns.

Aside from being unnecessary, the ruling sought by Petitioners would be damaging. Petitioners' argument for opening up individual capacity suits against tribal employees has no limits and makes no distinctions—for example, whether the allegedly harmful acts were within the scope of employment or not; whether or not the Tribe has in fact made a remedy available, as it did in this case; or whether the incident occurred on tribal or non-tribal lands. As a result, the ruling Petitioners seek in this case would undermine every one of *Amici*

Tribes' negotiated intergovernmental agreements and carefully crafted tribal laws discussed above, along with every other such negotiated agreement and tribal law throughout the country. There is no need for this Court to make such a sweeping change to existing laws and expectations, particularly in a case like this one where Congress has acted through the IGRA to preempt the field and require that the type of remedies sought by Petitioners be defined only through negotiated intergovernmental compacts balancing both state and tribal interests.

Respectfully submitted,

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December 21, 2016